

Decision **DRAFT DECISION OF ALJ BUSHEY** (Mailed 8/3/2004)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Commission Order Instituting Rulemaking on the Commission's own motion to set rules and to provide guidelines for the Privatization and Excess Capacity as it relates to investor owned water companies.

Rulemaking 97-10-049
(Filed October 22, 1997)

OPINION DENYING PETITION TO MODIFY DECISION 03-04-028

I. Summary

In this decision the Commission denies the petition of the California Water Association (CWA) to modify Decision (D.) 03-04-028.

II. Background

The Commission opened this proceeding to consider rules and guidelines for regulated water utilities to better utilize "excess capacity."¹ In D.00-07-018, we adopted a methodology for water utilities to allocate revenue from non-tariffed projects between ratepayers and shareholders. In D.03-04-028, we modified D.00-07-018 to correct an error that created an unintended exemption for certain projects from the Commission approval process adopted in that decision.

¹ As used in this proceeding, "excess capacity" refers to untariffed sales of goods or services by a public utility using regulated assets or employees.

On April 6, 2004, CWA filed its petition seeking modification of D.03-04-028, or in that alternative, clarification. CWA stated that the approval process adopted in D.00-07-018, and modified in D.03-04-028, places water utilities at a competitive disadvantage to electric utilities offering similar services because electric utilities obtain approval for categories of service offerings with no further Commission approval required for individual contracts. In contrast, CWA contended that modified Ordering Paragraph 5 of D.03-04-028 could be misinterpreted to require that water utilities obtain Commission approval for each service contract. CWA argued that water utilities, like electric utilities, should only be required to file requests for approval of categories of non-tariffed services, not each contract.

III. Discussion

Pursuant to Rule 47 of the Commission's Rule of Practice and Procedure, "in response to a petition for modification, the Commission may modify the decision as requested, modify the affected portion of the decision in some other way consistent with the requested modification, set the matter for further hearings or briefings, summarily deny the petition on the ground that the Commission is not persuaded to modify the decision, or take other appropriate action."

CWA's petition presents arguments heard and rejected by D.03-04-028. We again reject those arguments and deny the petition. All water utilities must obtain Commission authorization for each contract that provides goods or services using assets or employees reflected in the utility's revenue requirement.

In D.03-04-028, we determined that the approval process for water utilities should not be same as electric utilities. In Appendix A to today's decision we have reproduced a lengthy extract from D.03-04-028, including Attachment A to

that decision. This extract contains our original analysis of this issue, and the analysis fully addresses CWA's issues raised again in the petition to modify. In brief, CWA is proposing we apply to water utilities part of our system of energy regulation while ignoring other parts of that system.

CWA has provided no new rationale to support its previously rejected contention, and we are not persuaded to modify our earlier determination. Specifically, any water utility that proposes to engage in any sale of any non-tariffed goods or services provided, in whole or in part, by assets or employees included in the utility's revenue requirement, must file an advice letter seeking Commission approval. Such approval must occur prior to the sale of goods or services. We also required each water utility to specifically describe, document, and provide supporting accounting detail in its next general rate case application for all non-tariffed offerings.

IV. Comment on Draft Decision

The draft decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure.

CWA filed comments contending that the draft decision failed to address CWA's proposal to allow approval of a category of non-tariffed service offerings, rather than on a contract-by-contract basis. CWA asserts that the electric utilities, with which water utilities often compete to sell non-tariffed goods or services, obtain approval for categories and are not required to obtain approval of each contract. CWA argues that Commission-regulated water utilities should be subject to the same requirements for non-tariffed offerings as electric utilities.

CWA's current proposal, to obtain approval of categories, like its previous proposal, however, ignores the numerous requirements applicable to electric

utilities, but not water utilities. These requirements are set out in Attachment A to D.03-04-028. As one example, Rule C.4.e. limits electric utilities' non-tariffed offerings to no more than 1% of the number of customers in the electric utility's customer base. No such rule applies to water utilities. Should the water utilities wish to submit to the full panoply of affiliated interest rules applicable to electric utilities, and thus be on equal footing with the electric utilities, the water utilities may file a petition for rulemaking pursuant to § 1708.5 and Commission Rule 14.7.

We, therefore, decline to substantially revise the draft decision. We have, however, made several clarifying edits to the findings of fact and conclusions of law to better describe CWA's current proposal and the Commission's rationale.

V. Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Maribeth A. Bushey is the assigned ALJ in this proceeding.

Findings of Fact

1. In its petition for modification, CWA proposed to file advice letters to obtain approval of categories of non-tariffed offerings.
2. CWA's current proposal, like the proposal rejected in D.03-04-028, would apply to water utilities only a part of the system under which electric utilities make non-tariffed offerings.
3. CWA has not advanced new reasons or circumstances that should cause the Commission to reconsider its prior rejection.

Conclusions of Law

1. Pursuant to Rule 47 of the Commission's Rule of Practice and Procedure, the Commission may summarily deny a petition for modification on the ground that the petitioner presents no persuasive reason to modify the earlier decision.

2. In D.03-04-028, the Commission rejected CWA's proposal to apply to water utilities only a part of the system under which electric utilities make non-tariffed offering.

3. Pursuant to §1708.5 and Commission Rule 14.7, any person may file a petition for rulemaking to extend the electric utility affiliated interest rules to water utilities.

4. All water utility contracts for non-tariffed goods or services that are provided, in whole or in part, by assets or employees reflected in the utility's revenue requirement should be subject to prior Commission review and approval.

5. Today's decision should be made effective immediately.

O R D E R

Therefore, **IT IS ORDERED:**

1. The Petition of the California Water Association for Modification, or in the Alternative, Clarification of Decision 03-04-028 is summarily denied pursuant to Rule 47 of the Commission's Rules of Practice and Procedure.

2. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.

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CWA next contends that the existing ordering paragraph is consistent with the Office of the Ratepayer Advocates (ORA)/Southern California Edison Company (Edison) settlement approved in D.99-09-070, and that the Commission intended to adopt a similar program for water utilities. CWA describes the settlement as providing:

Existing affiliate transaction rules (Rule 7.E) required Edison to file an advice letter before offering a new category of non-tariffed products or services, and the settlement required Edison to treat such new offerings as passive (subject to a 30% ratepayer share of gross revenues) unless Edison could show in its advice letter that an offering should be considered “active.”

CWA Brief at 8.

In contrast to the ORA/Edison settlement, the affiliated interest rules on non-tariffed offerings do not apply to water utilities. These rules are reproduced in Attachment A. As CWA points out, these rules require an energy utility to file an advice letter for categories of offerings but not for individual contracts. The term “category” is defined as “a factually similar group of products and services that use the same type of utility assets or capacity.” Such a filing allows the Commission to review the utility’s assertion of excess capacity and no diminished utility service. In contrast to the affiliated interest rule filing requirement, CWA advocates here for all listed active offerings to be completely exempt from filing with the Commission. Another significant difference is that the ORA/Edison settlement creates the presumption that all new offerings are passive, with customers receiving 30% of revenues, rather than the 10% provided

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for active offerings. No such presumption is applicable to water utilities. In sum, the view that CWA advocates would not allow the Commission any review prior to the utility entering into the contract, and is thus not consistent with the ORA/Edison settlement.²

CWA's final contention is that the rules governing energy and water utilities' nontariffed offerings should be comparable. As set out above, however, CWA seeks a lower level of Commission review for water utility offerings, not a comparable review.

² We note that D.00-07-018 does not foreclose a water utility from filing "generic" contracts for nontariffed services. Such a filing could set out the terms and conditions for a particular non-tariffed service without a specific customer.

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I. Utility Products and Services

- A. **General Rule:** Except as provided for in these Rules, new products and services shall be offered through affiliates.
- B. **Definitions:** The following definitions apply for the purposes of this section (Section VII) of these Rules:
1. "Category" refers to a factually similar group of products and services that use the same type of utility assets or capacity. For example, "leases of land under utility transmission lines" or "use of a utility repair shop for third party equipment repair" would each constitute a separate product or service category.
 2. "Existing" products and services are those which a utility is offering on the effective date of these Rules.
 3. "Products" include use of property, both real and intellectual, other than those uses authorized under General Order 69-C.
 4. "Tariff" or "tariffed" refers to rates, terms and conditions of services as approved by this Commission or the Federal Energy Regulatory Commission (FERC), whether by traditional tariff, approved contract or other such approval process as the Commission or the FERC may deem appropriate.
- C. **Utility Products and Services:** Except as provided in these Rules, a utility shall not offer nontariffed products and services. In no event shall a utility offer natural gas or electricity commodity service on a nontariffed basis. A utility may only offer for sale the following products and services:
1. Existing products and services offered by the utility pursuant to tariff;
 2. Unbundled versions of existing utility products and services, with the unbundled versions being offered on a tariffed basis;
 3. New products and services that are offered on a tariffed basis; and
 4. Products and services which are offered on a nontariffed basis and which meet the following conditions:
 - a. The nontariffed product or service utilizes a portion of a utility asset or capacity;
 - b. such asset or capacity has been acquired for the purpose of and is necessary and useful in providing tariffed utility services;
 - c. the involved portion of such asset or capacity may be used to offer the product or service on a nontariffed basis without

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adversely affecting the cost, quality or reliability of tariffed utility products and services;

- d. the products and services can be marketed with minimal or no incremental capital, minimal or no new forms of liability or business risk being incurred by the utility, and minimal or no direct management control; and
 - e. the utility offering is restricted to less than 1% of the number of customers in its customer base.
- D. **Conditions Precedent to Offering New Products and Services:** This Rule does not represent an endorsement by the Commission of any particular nontariffed utility product or service. A utility may offer new nontariffed products and services only if the Commission has adopted and the utility has established:
- 1. A mechanism or accounting standard for allocating costs to each new product or service to prevent cross-subsidization between services a utility would continue to provide on a tariffed basis and those it would provide on a nontariffed basis;
 - 2. A reasonable mechanism for treatment of benefits and revenues derived from offering such products and services, except that in the event the Commission has already approved a performance-based ratemaking mechanism for the utility and the utility seeks a different sharing mechanism, the utility should petition to modify the performance-based ratemaking decision if it wishes to alter the sharing mechanism, or clearly justify why this procedure is inappropriate, rather than doing so by application or other vehicle.
 - 3. Periodic reporting requirements regarding pertinent information related to nontariffed products and services; and
 - 4. Periodic auditing of the costs allocated to and the revenues derived from nontariffed products and services.
- E. **Requirement to File an Advice Letter:** Prior to offering a new category of nontariffed products or services as set forth in Section VII C above, a utility shall file an advice letter in compliance with the following provisions of this paragraph.

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1. The advice letter shall:
 - a. demonstrate compliance with these rules;
 - b. address the amount of utility assets dedicated to the non-utility venture, in order to ensure that a given product or service does not threaten the provision of utility service, and show that the new product or service will not result in a degradation of cost, quality, or reliability of tariffed goods and services;
 - c. demonstrate that the utility has not received recovery in the Transition Cost Proceeding, A.96-08-001, or other applicable Commission proceeding, for the portion of the utility asset dedicated to the non-utility venture; and
 - d. address the potential impact of the new product or service on competition in the relevant market.
2. In the absence of a protest alleging non-compliance with these Rules or any law, regulation, decision, or Commission policy, or allegations of harm, the utility may commence offering the product or service 30 days after submission of the advice letter.
3. A protest of an advice letter filed in accordance with this paragraph shall include:
 - a. An explanation of the specific Rules, or any law, regulation, decision, or Commission policy the utility will allegedly violate by offering the proposed product or service, with reasonable factual detail; or
 - b. An explanation of the specific harm the protestant will allegedly suffer.
4. If such a protest is filed, the utility may file a motion to dismiss the protest within 5 working days if it believes the protestant has failed to provide the minimum grounds for protest required above. The protestant has 5 working days to respond to the motion.
5. The intention of the Commission is to make its best reasonable efforts to rule on such a motion to dismiss promptly. Absent a ruling granting a motion to dismiss, the utility shall begin offering that category of products and services only after Commission approval through the normal advice letter process.

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- F. **Existing Offerings:** Unless and until further Commission order to the contrary as a result of the advice letter filing or otherwise, a utility that is offering tariffed or nontariffed products and services, as of the effective date of this decision, may continue to offer such products and services, provided that the utility complies with the cost allocation and reporting requirements in this rule. No later than January 30, 1998, each utility shall submit an advice letter describing the existing products and services (both tariffed and nontariffed) currently being offered by the utility and the number of the Commission decision or advice letter approving this offering, if any, and requesting authorization or continuing authorization for the utility's continued provision of this product or service in compliance with the criteria set forth in Rule VII. This requirement applies to both existing products and services explicitly approved and not explicitly approved by the Commission.
- G. **Section 851 Application:** A utility must continue to comply fully with the provisions of Public Utilities Code Section 851 when necessary or useful utility property is sold, leased, assigned, mortgaged, disposed of, or otherwise encumbered as part of a nontariffed product or service offering by the utility. If an application pursuant to Section 851 is submitted, the utility need not file a separate advice letter, but shall include in the application those items which would otherwise appear in the advice letter as required in this Rule.
- H. **Periodic Reporting of Nontariffed Products and Services:** Any utility offering nontariffed products and services shall file periodic reports with the Commission's Energy Division twice annually for the first two years following the effective date of these Rules, then annually thereafter unless otherwise directed by the Commission. The utility shall serve periodic reports on the service list of this proceeding. The periodic reports shall contain the following information:
1. A description of each existing or new category of nontariffed products and services and the authority under which it is offered;
 2. A description of the types and quantities of products and services contained within each category (so that, for example, "leases for agricultural nurseries at 15 sites" might be listed under the category "leases of land under utility transmission lines," although the utility would not be required to provide the details regarding each individual lease);
 3. The costs allocated to and revenues derived from each category; and
 4. Current information on the proportion of relevant utility assets used to offer each category of product and service.
- I. **Offering of Nontariffed Products and Services to Affiliates:** Nontariffed products and services which are allowed by this Rule may be offered to utility **affiliates** only in compliance with all other provisions of these Affiliate Rules. Similarly, this Rule does not prohibit affiliate transactions which are otherwise allowed by all other provisions of these Affiliate Rules.

(END OF ATTACHMENT A)